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No. 04-1704

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

CHARLOTTE CUNO, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR PETITIONER DAIMLERCHRYSLER CORPORATION

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QUESTIONS PRESENTED

1. Whether respondents have standing to challenge Ohio's investment tax credit, Ohio Rev. Code Ann. § 5733.33.

2. Whether Ohio's investment tax credit, which seeks to encourage economic development by providing a credit to taxpayers who install new manufacturing machinery and equipment in the State, violates the Commerce Clause of the United States Constitution.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the court of appeals were plaintiffs Charlotte I. Cuno, Duane M. Arquette, Robert Scott Brundage, Julie Coyle, Helen Czapczynski, Mary Ebright, Carrie Hawkins, Kathleen Hawkins, Hutton Pharmacy, Inc., Jean E. Kaczmarek, Kim's Auto and Truck Service, Inc., Judith A. Pfaff, Kenneth P. Pfaff, Phoenix Earth Food Co-op, Inc., Carol A. Raschke, Herbert H. Raschke, Rick Van Landingham, and defendants DaimlerChrysler Corporation, the Toledo Public School District, the Washington Local School District, the City of Toledo, the State of Ohio, the Ohio State Treasurer, the Ohio Department of Taxation, and the Ohio Department of Development.

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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BRIEF FOR PETITIONER DAIMLERCHRYSLER CORPORATION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 386 F.3d 738 (6th Cir. 2004). The order of the court of appeals denying rehearing (Pet. App. 31a) is unreported. The opinion and order of the district court (Pet. App. 18a-30a) is reported at 154 F. Supp. 2d 1196 (N.D. Ohio 2001).

JURISDICTION

The Court has posed the question whether respondents have standing to challenge the Ohio investment tax credit. Petitioners believe that respondents lack standing.

Respondents originally filed suit in state court. Petitioners removed the case to federal court pursuant to 28 U.S.C. § 1441. The district court had jurisdiction pursuant to that statute and 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on October 19, 2004. The court of appeals denied DaimlerChrysler's petition for rehearing en banc on January 18, 2005. On April 7, 2005, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including June 17, 2005. The petition for a writ of certiorari was filed on June 17, 2005, and granted on September 27, 2005. 126 S. Ct. 36 (2005). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the Constitution, U.S. Const. art. I, § 8, cl. 3, provides in relevant part:

> The Congress Shall have Power * * * To Regulate commerce * * * among the several States.

Ohio Revised Code Ann. § 5733.33 is reproduced in the Petition Appendix at 32a-43a.

STATEMENT OF THE CASE

Several Ohio and Michigan taxpayers have challenged Ohio's investment tax credit—a "subsidy" designed to incentivize capital investment in the State's most economically depressed areas—principally on the ground that "the subsidy depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments." J.A. 28a (Complaint for Declaratory and Injunctive Relief ¶ 40). Just as they do now, respondents lacked Article III standing to bring this challenge. The court of appeals did not address standing, instead ruling solely on the merits. Its decision stands for the proposition that the Commerce Clause of the United States Constitution (or, more specifically, its so-called negative or dormant aspect) prohibits states from offering such tax incentives to encourage economic development. If upheld, hundreds of similar tax programs and, presumably, other incentives to development, offered by most states would similarly fall. But that decision finds no support in the purpose of the Commerce Clause or this Court's dormant Commerce Clause decisions. To the contrary, the ruling below deviates widely from Commerce Clause principles announced by this Court and does violence to important concepts of federalism fundamental to the Constitution's structure. The decision of the Sixth Circuit should accordingly be reversed.

1. Ohio's Investment Tax Credit

"Today, every state provides tax and other economic incentives as an inducement to local industrial location and expansion." Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 790 (1996) (footnotes omitted).

Such "[l]ocation[al] incentives have become an ubiquitous feature of the state tax scene." Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 Harv. L. Rev. 377, 384 (1996). And of the myriad state and local provisions that are intended to attract and encourage business development, "[t]he most common form of state tax incentive in this country is the income tax credit." Hellerstein & Coenen, *supra*, 81 Cornell L. Rev. at 817.

This case involves a constitutional challenge to one such provision, the State of Ohio's investment tax credit ("ITC"). *See* Ohio Rev. Code Ann. ("O.R.C.") § 5733.33. The ITC is typical of the economic development tax incentives offered by states across the country. It encourages businesses to increase investment in machinery and equipment by reducing one of the largest single costs of doing business in Ohio—the State's corporate franchise tax. *See* O.R.C. § 5733.06. As even the respondents acknowledge, the ITC functions as a subsidy, reducing the cost of doing business and thus offering a non-recurring economic incentive to invest capital.

The ITC makes a corporate taxpayer eligible for a "nonrefundable credit . . . against" Ohio's corporate franchise tax. O.R.C. § 5733.33(B)(1). The corporate franchise tax applies to for-profit corporations "for the privilege of doing business in [Ohio], owning or using a part or all of its capital or property in [Ohio], holding a certificate of compliance with the laws of th[e] state authorizing it to do business in [Ohio], or otherwise having nexus in or with [Ohio] . . . ." *Id.* § 5733.01(A); *see also Wesnovtek Corp. v. Wilkins*, 825 N.E.2d 1099, 1100 (Ohio 2005).

A taxpayer is entitled to the ITC if it purchases and installs "new manufacturing machinery and equipment" in Ohio during the time periods set forth in the statute. O.R.C. § 5733.33(B)(1). The ITC "is equal to seven and one-half per cent of the excess of the cost of the new manufacturing

machinery and equipment purchased" by the taxpayer during a calendar year for use in an Ohio county, over and above the taxpayer's average annual expenditures on new manufacturing machinery and equipment in that county during three specified prior years. *Id.* § 5733.33(C)(1). The size of the credit increases to thirteen and one-half percent if the otherwise qualifying investment is made in an "eligible area" that suffers from specified levels of unemployment or poverty, or has experienced significant business closings or downsizing by local employers. *Id.* §§ 5733.33(C)(2), (A)(8)-(16). The ITC may exceed $1,000,000 if, in the year for which it is claimed, the taxpayer has increased its overall ownership of manufacturing equipment in the State.[1] *Id.* § 5733.33(B)(2)(a).

As a nonrefundable credit, the ITC may be used only to offset liability for the franchise tax. *Id.* § 5733.33(B)(1). The credit is used over seven years in increments of "one-seventh of the credit amount for the tax year immediately following the calendar year in which the new manufacturing machinery and equipment is purchased." *Id.* § 5733.33(C)(4). Any portion of the ITC remaining unused may be carried forward an additional three years. *Id.* § 5733.33(D).

The ITC is a significant tool in Ohio's ongoing effort to encourage capital investment in the State. In its certiorari

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[1] Ohio law also provides that a municipal corporation may offer a property tax exemption to an enterprise that develops facilities or preserves employment in a distressed area. O.R.C. § 5709.62. Respondents also challenged the constitutionality of the property tax exemption extended by the City of Toledo, but the district court and the Sixth Circuit both upheld that provision. *See* Pet. App. 14a, 29a. Respondents' petition for a writ of certiorari based on that part of the Sixth Circuit's ruling remains pending with this Court. *See* Pet. for Writ of Cert., *Cuno v. DaimlerChrysler Corp.*, No. 04-1407 (U.S. Apr. 18, 2005).

petition, Ohio explained that, since the credit's inception in 1995, corporations have invested more than $30 billion in plants and equipment in Ohio in reliance on the ITC. *See* Pet. for Writ of Cert., *Wilkins v. Cuno*, No. 04-1724 (U.S. June 17, 2005), at 4.

2. *Background Of The Litigation*

In 1998, petitioner DaimlerChrysler entered into an agreement with the City of Toledo, Ohio, to construct a new vehicle assembly plant near the company's existing facility in the City. Pet. App. 2a. DaimlerChrysler estimated that it would invest approximately $1.2 billion in the new plant, thereby creating several thousand new jobs in an economically distressed area. *Id.* The City and the affected local school districts agreed that the company would receive the tax incentives made available by state law to encourage local economic development. Pursuant to O.R.C. § 5733.33, one of the incentives DaimlerChrysler received was an investment tax credit of thirteen and one-half percent for the investments it has made related to the project through December 31, 2000.

Invoking the U.S. Constitution's Commerce Clause and the Ohio Constitution, respondents, nearly all of whom are Ohio or Michigan taxpayers, brought this action in Ohio state court against DaimlerChrysler, the State of Ohio, and the City of Toledo. Advancing what they have readily conceded is a "novel legal theory" (No. 01-3960, *Cuno v. DaimlerChrysler Corp.* (6th Cir.), Pl.'s. Br., at viii), respondents mounted a facial challenge to the ITC statute. *See* J.A. 30a-31a. As respondents asserted claims under the federal Constitution, petitioners removed the case to the United States District Court for the Northern District of Ohio. *See* C.A. J.A. 12-14. Respondents moved to remand the case to state court, arguing, *inter alia*, that "there are substantial doubts about [respondents'] ability to satisfy either the constitutional or the prudential limitations on standing in the federal court."

C.A. J.A. 138. Petitioners opposed remand, arguing that at least one respondent had standing to bring each of the federal claims raised in the complaint. *See* C.A. J.A. 158-65, 195-205. With regard to respondents' federal challenge to the City of Toledo's property tax abatement, petitioners argued that respondents had standing under the doctrine of municipal taxpayer standing. *See* C.A. J.A. 161-62, 197-99 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923)). With regard to respondents' Commerce Clause challenge to the ITC, petitioners argued that Kim's Auto and Truck Service, Inc., a business located in the development zone and slated for condemnation to make way for the Jeep plant, had standing. *See* C.A. J.A. 163-64, 200-01. The district court denied the motion to remand, holding that, "under the 'municipal taxpayer standing' rule articulated in *Massachusetts v. Mellon*, 262 U.S. 447," "at least at this early stage in the litigation, . . . Plaintiffs have standing to proceed in federal court." J.A. 78a.

The district court ultimately rejected respondents' claims on the merits. Pet. App. 18a-30a. After canvassing relevant case law, the court concluded that the "investment tax credit is not akin to a tariff, since it does not burden in the slightest the transfer of goods in interstate commerce," and that the credit also does not punish activity occurring outside of Ohio. *Id.* 28a. The court accordingly held that the tax credit does "not 'discriminate against interstate commerce,'" concluding that it could not find the credit unconstitutional without "violat[ing] the clear mandate of Supreme Court precedent," and dismissed respondents' complaint. *Id.* 29a-30a.

3. The Decision Below

The Sixth Circuit reversed in part, holding that the investment tax credit is unconstitutional. Pet. App. 1a-17a. The court began by recognizing that "it is legitimate for Ohio to structure its tax system to encourage new interstate economic activity" and that the Commerce Clause does not

"prevent a state from 'compet[ing] with other States for a share of interstate commerce.'" *Id.* 4a-5a (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336-37 (1977)). The court also acknowledged that "the investment tax credit at issue here is equally available to in-state and out-of-state businesses." *Id.* 6a. However, it still found that the ITC violated the dormant Commerce Clause. *Id.* 9a-11a.

The Sixth Circuit concluded that the ITC failed the third prong of the test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), holding that, when coupled with the ITC, Ohio's franchise tax "discriminate[s] against interstate commerce." Pet. App. 4a. The court rejected any "distinction between laws that benefit in-state activity and laws that burden out-of-state activity." Pet. App. 9a. "[A]s between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden . . . while a competitor that invests out-of-state will face a comparatively higher tax burden . . . ." *Id.* 6a. In the Sixth Circuit's view, Ohio's decision not to give the same tax credit to a business that chooses to expand outside of Ohio is itself a burden on interstate commerce. *See id.* 9a-10a. Additionally, the court rejected any analogy of tax credits like the ITC to constitutionally permissible direct subsidies, even though the court harbored "no doubt [that they] have the same economic effect." *Id.* 10a. Reasoning that the reward for investing in Ohio was in fact a tool of "coerc[ion]" that discourages corporations from investing elsewhere, *id.* 6a, the Sixth Circuit concluded that the ITC unconstitutionally discriminates against interstate commerce.

Even though the issue was noted in the petitions for rehearing, the court of appeals did not address respondents' standing to sue.

SUMMARY OF ARGUMENT

1. In contrast to every other dormant Commerce Clause case to reach this Court, the parties challenging the constitutionality of Ohio's ITC do not claim that their interstate activities are burdened by the allegedly unconstitutional state action. Respondents are not among the similarly-situated businesses that the lower court believes are "coerced" into investing in Ohio lest they forfeit the benefit of a credit against their Ohio franchise tax as a consequence of investing elsewhere. Respondents thus lack Article III standing to challenge Ohio's franchise tax-and-credit regime.

The minimum requirements for Article III standing are clear: (1) an "injury in fact"; that is, "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent"; (2) "a causal connection between the injury and the conduct complained of"; and (3) a likelihood, not mere speculation, "that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). The taxpayer respondents, who purport to be aggrieved by the tax credit because "the subsidy depletes the funds of the State of Ohio to which Plaintiffs contribute through their tax payments," J.A. 28a, fail to meet these requirements. Their claim is nothing more than a generalized grievance, available to any citizen, about his taxes. This Court has long held that such an alleged injury is insufficient for Article III purposes. Indeed, here the case for taxpayer standing is even weaker than usual, because respondents complain not that the State imposes a discriminatory tax on them, but that a credit against that tax (which most respondents do not pay) somehow reduces the State's overall tax receipts to which respondents contribute. This is not a concrete and particularized injury capable of creating a justiciable case or controversy.

One respondent, Kim's Auto & Truck Service, Inc. ("Kim's Auto"), alleges a different kind of harm—economic injuries arising out of the forced relocation of its business—a relocation that was supposedly caused by the State's enactment of the ITC, which in turn caused DaimlerChrysler to seek to locate its plant on Kim's Auto's property, which in turn led the City of Toledo to seize that property by eminent domain. Even assuming that the relocation of Kim's Auto constitutes a cognizable injury, it still cannot satisfy the second and third requirements for standing. The injuries allegedly suffered by Kim's Auto were not caused, in any meaningful way, by Ohio's enactment of the ITC. Rather, the displacement of Kim's Auto was caused solely by eminent domain proceedings initiated by the City of Toledo. Moreover, there is ***no*** likelihood whatsoever that Kim's Auto's alleged economic injuries can be redressed by a favorable decision. Even if the court had granted the relief requested in the complaint—invalidation of the ITC—that would not have stopped the taking of Kim's Auto's property through eminent domain proceedings. Moreover, during the pendency of this case, the eminent domain proceedings involving Kim's Auto became final. Thus, even if Kim's Auto prevailed in this suit, the courts could grant Kim's Auto no meaningful relief.

2. Even assuming that one or more of the respondents has standing to sue, respondents' dormant Commerce Clause challenge to Ohio's ITC must fail on its merits. As recognized by this Court's precedents, the negative aspect of the Commerce Clause—the so-called dormant Commerce Clause—preserves our federal system by prohibiting the several States from distorting economic markets through the enactment of protectionist barriers to out-of-state competition. This Court has struck down state regulatory or taxation schemes that created such barriers and thereby threatened to create a "multiplication of preferential trade areas," tearing asunder our national economic market. *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951). Reasoning that "eco-

nomically speaking, the effect of a tax benefit or burden is the same," the court of appeals concluded that Ohio's ITC was just such a market-distorting, protectionist measure. Pet. App. 10a. The Sixth Circuit's mode of analysis is simplistic and deeply flawed. Ohio's ITC is not the sort of nefarious, protectionist measure that favors indigenous industry at the expense of out-of-state competitors. Indeed, far from erecting a barrier to interstate commerce, tax credits like Ohio's promote commerce—interstate and intrastate—by spurring competition between the States to create attractive environments for capital investment and economic development.

The taxation regimes struck down by this Court have taken several forms: a tax on an industry with different rates for in-state and out-of-state actors, *see, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-73 (1984); *Boston Stock Exchange*, 429 U.S. at 331-32; a tax on both in-state and out-of-state actors with an offsetting credit available only to in-state actors, *see, e.g., Maryland v. Louisiana*, 451 U.S. 725, 753-60 (1981); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 398-407 (1984), or a tax on in-state and out-of-state actors for the purpose of funding rebates or subsidies to the in-state actors, *see, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194-97 (1994). Whatever the particular design of the state taxation regime in question, those struck down by this Court under the dormant Commerce Clause all share two salient features: First, the state placed an actual financial burden on interstate commerce, which is to say, on out-of-state actors or out-of-state transactions; second, the state unfairly discriminated against interstate commerce by placing a greater financial burden on out-of-state actors than in-state actors.[2] Ohio's ITC suffers from neither of these flaws.

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[2] This Court has also struck down state taxation schemes, even if non-discriminatory, when they are unfairly apportioned. *See, e.g., Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 273-75

a. Although this Court often enough has subjected tax credits and exemptions to Commerce Clause scrutiny where the "benefits" to in-state actors are accompanied by greater "burdens" on out-of-state actors or activity, *see, e.g.*, *Maryland v. Louisiana*, 451 U.S. at 753-60, neither respondents nor the decision below identify a single case in which this Court has struck down a credit or exemption when the underlying tax does not reach the out-of-state transaction against which the state tax scheme supposedly discriminates. For dormant Commerce Clause scrutiny to apply, this Court's precedents require at least that the challenged state tax fix an actual financial burden on interstate commerce. Here, though, Ohio's franchise tax does not levy against the out-of-state conduct that is supposedly the object of Ohio's discrimination—capital investments outside of Ohio. Indeed, far from increasing a corporation's Ohio franchise tax burden, out-of-state investments generally have the effect of reducing a corporation's liability under the franchise tax. The ITC is, as respondents allege in their complaint, simply a "subsidy" to in-state investments. J.A. 28a.

The court of appeals short-circuited the dormant Commerce Clause analysis by assuming as a matter of "economic[s]" that any in-state benefit accorded by the ITC reflexively generates a corresponding out-of-state burden. This was error. Because Ohio's franchise tax does not levy

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(1987) (invalidating as unfairly apportioned flat $25 "marker fee" and flat "axle tax" levied on all trucks operating in or passing through Pennsylvania). The "central purpose" of the fair apportionment requirement is to ensure that each state taxes only its fair share of an interstate transaction, *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989), and that interstate commerce is "not unjustly burdened by multistate taxation," *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 n.12 (1997). Respondents have never alleged—nor did the Sixth Circuit hold—that Ohio's corporate franchise tax is unfairly apportioned. *See* Pet. App. 4a.

against or otherwise burden out-of-state investments, the ITC functions merely as a subsidy to in-state investment—an exercise of state police power never before questioned by this Court, or indeed, by the courts of appeals.

b. Nor does application of the ITC only to in-state investments discriminate against out-of-state investors. Different treatment is not discrimination unless the parties are similarly situated. DaimlerChrysler and a company that chooses to invest out-of-state are not similarly situated vis-à-vis the Ohio franchise tax. First, the company that increases investment out-of-state decreases its percentage of Ohio business value and Ohio activity. Thus, rather than expose a greater amount of its income or net worth to Ohio franchise tax liability, under the franchise tax's apportionment formula, the new out-of-state investment will, in all likelihood, result in a reduction in the company's effective Ohio tax rate. Second, any tax impact of the decision to invest out-of-state will be governed, naturally enough, by the laws of the state or foreign country where the new investment is located. Thus, Ohio's decision to reward in-state investment neither burdens nor discriminates against businesses wishing to invest outside of Ohio.

Ohio's ITC, undeniably designed to encourage local economic development, is not the type of anti-competitive protectionist measure the Commerce Clause was meant to prohibit. Rather, by lowering the cost of doing business in Ohio, it legitimately encourages rational economic actors to do business there. Accordingly, there is no basis whatsoever for the Sixth Circuit's conclusion that Ohio's ITC violates the dormant Commerce Clause.

ARGUMENT

I. RESPONDENTS' CHALLENGE TO THE INVESTMENT TAX CREDIT SHOULD BE DISMISSED FOR LACK OF STANDING

This case arrives at this Court in an unusual procedural posture. In the removal proceeding, it was respondents who articulated doubts concerning their own standing to sue, while petitioners argued that those doubts were largely misplaced. Although petitioners argued before the district court that respondents had standing to challenge the constitutionality of the ITC through the allegations of Kim's Auto, upon reflection, the better view is that respondents lack standing.[3] *See generally* Kristin E. Hickman, *How Did We Get Here Anyway?: Considering the Standing Question in* Daimler-Chrysler v. Cuno, 4 Geo. J.L. & Pub. Pol'y (forthcoming Feb. 2006), *available at* http://ssrn.com/abstract=859784. This Court's dormant Commerce Clause cases have conferred standing only on those parties whose interstate commerce was actually burdened by the challenged state action (and, occasionally, their customers). That is to say, this Court has found cognizable only the dormant Commerce Clause claims of those actually injured by the state action, and has never, in a dormant Commerce Clause case, conferred standing on a taxpayer as such. To do so here would flatly contradict this Court's most forceful standing precedents. Those cases confirm the Article III case-and-

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[3] In its petition for rehearing from the decision of the court of appeals, Ohio argued that respondents lacked standing to pursue the litigation. *See* Pet. for Reh'g of Gov't Appellees, *Cuno v. DaimlerChrysler Corp.*, No. 01-3960 (6th Cir. Sept. 15, 2004), at 9-15. DaimlerChrysler concurred that vacatur of the judgment was appropriate if the court agreed with the State. *See* Pet. for Reh'g of Appellee DaimlerChrysler Corp., *Cuno v. DaimlerChrysler Corp.*, No. 01-3960 (6th Cir. Sept. 16, 2004), at 15 n.6.

controversy requirements that a plaintiff allege a particularized injury-in-fact (1) that is not speculative or hypothetical, (2) that is fairly traceable to (*i.e.*, is caused by) the defendant's conduct, and (3) that is capable of being redressed by the relief sought in plaintiffs' complaint. *See Lujan*, 504 U.S. at 560.

In this case, with the exception of Kim's Auto, respondents' complaint alleges only generalized taxpayer grievances and otherwise fails to articulate the cognizable and particularized injury-in-fact required by this Court's standing decisions. And Kim's Auto also lacks standing, because whatever economic injury it might have suffered as a result of its relocation is not traceable to Ohio's enactment of the ITC; Kim's Auto's injury instead was caused by eminent domain proceedings initiated by the City of Toledo. Moreover, even if one assumed that the State did cause injury to Kim's Auto by enacting the ITC, the alleged injuries arising out of the displacement of Kim's Auto are not redressable by the injunctive or declaratory relief sought in the complaint. The property on which Kim's Auto once stood was seized last summer by the City of Toledo pursuant to its eminent domain power, Kim's Auto was compensated for that taking, and the Stickney Avenue Jeep Plant now occupies the parcel that previously belonged to Kim's Auto. The declaratory and injunctive relief sought in the complaint, even if granted, will change none of that.

A. The Court Has Accorded Standing In Dormant Commerce Clause Cases Only To Parties Whose Interstate Commerce Is Burdened By State Action

This Court has ***never*** conferred standing to challenge state action under the dormant Commerce Clause to taxpayers as such. Indeed, in virtually every case in which the Court has applied the dormant Commerce Clause, the plain-

tiff with standing to press the action has been a person or entity whose interstate commerce was supposedly burdened by the challenged state action.[4] *See, e.g., Granholm v. Heald*, 125 S. Ct. 1885 (2005) (suit brought by out-of-state winery and state residents affected by ban on direct shipment of out-of-state wine); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (suit brought by non-profit corporation subject to higher property tax rate because of its predominantly out-of-state clientele).

Not so here. Respondents are not out-of-state entities who pay the challenged tax, competitors of taxpayers who obtain unfairly favorable tax treatment, or customers of entities that are handicapped by an allegedly unfair taxing regime. Instead, respondents are, for the most part, residents of the taxing State who would like that State to collect ***more*** tax from out-of-state companies doing in-state business. They are not, in any meaningful way, burdened by Ohio's enactment of the ITC; nor will they benefit in any concrete manner from its abolition and the creation of the purported "level playing field" between in-state and out-of-state competitors. Rather than seeking to remedy a cognizable injury they have suffered, their avowed goal is to "save the states from themselves," *see* Enrich, *supra*, 110 Harv. L. Rev. at 377, by precluding states from competing for business development

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[4] In a handful of cases, the court has recognized associations that represent a group whose interstate commerce was burdened by state action as having standing to bring a dormant Commerce Clause challenge. *See, e.g., Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n*, 125 S. Ct. 2419 (2005). Similarly, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), the Court recognized Maryland's and other states' standing to invoke the Court's original jurisdiction, not only as a direct purchasers of natural gas subject to Louisiana's first-use tax, but also as *parens patriae* of their citizens whose natural gas costs had also increased as a result of the tax. *Id.* at 737-38.

through the use of tax incentives that (in respondents' view) reduce state tax revenue. Whether or not this is desirable as a matter of public policy, it is an exceedingly strange use of the Commerce Clause, which has never before been permitted to function as a sword wielded by state taxpayers who are unhappy with steps taken by their elected officials to lure business across state lines. *Cf. Goldberg v. Sweet*, 488 U.S. 252, 266 (1989) ("[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes"). These are the sorts of plaintiffs whose suit is "more likely to frustrate than to further" Commerce Clause objectives and who, accordingly, cannot be viewed as "reliable" champions of Commerce Clause values. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 397 n.12 (1987).[5]

B. The Ohio Taxpayers Have Not Alleged A Cognizable Injury

It is axiomatic that "a plaintiff raising only a generally available grievance about government – claiming only harm to his and every other citizen's interest in proper application of the Constitution and laws, and seeking relief that no more

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[5] Accordingly, respondents fail the prudential "zone of interests" requirement for standing. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982). "The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such." *Gen. Motors*, 519 U.S. at 300. Moreover, insofar as respondents are championing not their own interests, but those of corporations whose investment decisions are actually affected by the Ohio ITC—as evidently contemplated by the court of appeals, *see* Pet. App. 6a, 8a-9a—they are advancing the interests of businesses who have chosen ***not*** to sue. Respondents' claims thus "fall[] squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others." *Warth v. Seldin*, 422 U.S. 490, 509 (1975).

directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74; *see also, e.g., Fairchild v. Hughes*, 258 U.S. 126, 129-30 (1922) (Brandeis, J.). Accordingly, suits premised on federal or state taxpayer status, as a general matter, "are not cognizable in the federal courts." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (Kennedy, J., joined by Rehnquist, C.J., and Stevens and Scalia, JJ.). As the Court explained in 1923, a federal taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote . . . that no basis is afforded for an appeal." *Mellon*, 262 U.S. at 487. For a taxpayer to establish standing, the Court explained, he "must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.* at 488.

For purposes of this rule, the Court has "likened state taxpayers to federal taxpayers." *ASARCO*, 490 U.S. at 613 (opinion of Kennedy, J.). This conclusion rests on *Mellon*'s observation that the interest of a federal taxpayer in the use of public funds is "comparatively minute and indeterminable," 262 U.S. at 487, which the Court has held to be "equally true when a state Act is assailed,"[6] *Doremus v. Bd.*

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[6] The Court has suggested that a different standard applies to *municipal* taxpayers, presuming that "[t]he interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate." *Mellon*, 262 U.S. at 486; *see also ASARCO*, 490 U.S. at 613 (opinion of Kennedy, J.). Reliance on that doctrine would surely be misplaced here where respondents challenge a *state* tax, and, that State has a population of 11.3 million (*see* U.S. Census Bureau, *Ohio Fact Sheet, available at*

of Educ., 342 U.S. 429, 434 (1952). Under the standard articulated in these decisions, state taxpayers will not have standing unless they complain of a "direct pecuniary injury," advance a "good-faith pocketbook action" that seeks to redress "a direct dollars-and-cents injury," and possess "the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct." *Id.* at 434-35.

The decision in *Doremus* accordingly "confirmed that the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer." *Valley Forge Christian Coll.*, 454 U.S. at 477; *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 18 n.8 (2004) (state taxpayer must allege "the 'direct dollars-and-cents injury' that our strict taxpayer-standing doctrine requires" (quoting *Doremus*, 342 U.S. at 434)). It is not enough that the challenged program is "likely to produce additional taxation to be imposed upon a vast number of taxpayers," *Mellon*, 262 U.S. at 487; instead, state taxpayers like respondents must demonstrate that the contested state program has a concrete, ascertainable, and immediate pecuniary impact on them.

The Ohio taxpayer respondents allege only that they are directly "injured" by the tax credit because it unlawfully "depletes the funds of the State of Ohio to which Plaintiffs contribute through their tax payments, thereby diminishing the

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http://factfinder.census.gov) and an annual budget of approximately $24.8 billion (*see* Ohio Office of Budget and Management, *The Ohio Budgetary Financial Report for the Fiscal Year Ended June 30, 2005* (July 25, 2005), at 4, *available at* http://www.obm.ohio.gov/finrep/budgtry/budgtry05.pdf.); *see also* Hickman, *supra*, at 18-20 (arguing that municipal taxpayer standing doctrine is rooted in the non-sovereign status of municipalities).

funds available for lawful uses and imposing disproportionate burdens on the Ohio Plaintiffs." J.A. 28a. This allegation cannot satisfy the *Doremus/Mellon* standard; the Ohio taxpayers did not suffer the "direct pecuniary injury," and are not advancing the "good-faith pocketbook action," that *Doremus* and *Mellon* require. Respondents do not claim that *they* are paying an unconstitutional tax, that *they* will obtain a refund or related remedy if they prevail in this litigation, or even that *they* are the customers of taxpayers who pay tax at a discriminatory rate and therefore suffer indirectly from the assertedly unconstitutional discrimination. *Cf. Gen. Motors Corp.*, 519 U.S. at 286-87; *Bacchus Imps., Ltd.*, 468 U.S. at 267. Instead, the injury alleged by respondents is essentially identical to that asserted by the taxpayer in *Mellon*: that the challenged statute has a financial impact on the state and therefore will "increase the complainant's future [state] income taxes." *United States v. Richardson*, 418 U.S. 166, 171-72 (1974).

The Court consistently has held this sort of allegation to be insufficient to confer standing. Respondents do not assert any "special circumstances" that distinguish them from all other state and federal taxpayers who might bring similar challenges to spending or tax incentive programs. *ASARCO*, 490 U.S. at 614 (opinion of Kennedy, J.). It is, of course, "pure speculation whether th[is] lawsuit would result in any actual tax relief for respondents" were they to prevail. *Id.* And the taxpayer respondents have not even attempted to show that the asserted constitutional injury affected them "in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1.

Indeed, even if respondents had alleged that the ITC visited a particularized economic injury upon them, this case is far afield even from those highly anomalous situations in which the Court has found that taxpayer standing might be appropriate. *See, e.g., Flast v. Cohen*, 392 U.S. 83, 107 (1968). In *Flast*, as in the hypothetical in *Mellon* (*see* 262 U.S. at 486), the taxpayer's contention was "that his tax

money [was] being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." *Flast*, 392 U.S. at 106. Here, in contrast, respondents are not challenging any tax imposed on upon *them*; their argument is that *others* should be compelled to pay more. In such circumstances, respondents cannot make out the direct and "necessary nexus between [their] status [as taxpayers] and the nature of the allegedly unconstitutional action to support [their] claim of standing." *Id.* at 106 (majority opinion). This reinforces the general rule of *Doremus* and *Mellon*.[7] The Ohio taxpayers accordingly cannot make out a "'personal stake in the outcome of the controversy,'" and thus do not satisfy the requirements of Article III standing. *Warth*, 422 U.S. at 498 (citation omitted).[8]

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[7] Moreover, *Flast*'s applicability is almost certainly limited to the Establishment Clause context, as held by four Justices of the *Flast* Court. *See Flast*, 392 U.S. at 114 (Stewart, J., concurring) ("I understand [*Flast*] to hold only that a federal taxpayer has standing to assert that a specific expenditure of federal funds violates the Establishment Clause"); *id.* at 116 (Fortas, J., concurring) ("The status of taxpayer should not be accepted as a launching pad for an attack upon any target other than legislation affecting the Establishment Clause"); *Valley Forge Christian Coll.*, 454 U.S. at 507-08 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting). *See also id.* at 514 (Stevens, J., dissenting) (expressing the "firm conclusion that the plaintiffs' invocation of the Establishment Clause was of decisive importance in resolving the standing issue in [*Flast*]"). Where the Establishment Clause is concerned, the exaction of taxes in support of a religious institution is itself the constitutional injury. *See Flast*, 392 U.S. at 114 (Stewart, J., concurring) (recognizing the plaintiffs' "clear stake as taxpayers in assuring that they not be compelled to contribute even 'three pence . . . of [their] property for the support of any one [religious] establishment'" (citation omitted; ellipses in original)).

[8] The Michigan taxpayers' claims of standing are even more farfetched than their Ohio counterparts. In addition to all the defi-

C. The Injuries Alleged By Kim's Auto Were Not Caused By Ohio's Enactment Of The ITC, And Cannot Be Redressed By The Relief Sought In The Complaint

The last respondent, Kim's Auto, claims direct injury because its property was "slated to be condemned by the City of Toledo and taken . . . to be conveyed to DaimlerChrysler in aid of the . . . Jeep plant project." J.A. 28a. Assuming that Kim's Auto has alleged a cognizable injury-in-fact, Kim's Auto nevertheless fails the causation and redressability requirements of Article III standing.

The causation element of Article III standing requires that the plaintiff's alleged injury "be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Here, whatever injury Kim's Auto might have suffered cannot be traced to Ohio's enactment of the ITC; Kim's Auto's injury rather was caused by the eminent domain proceeding initiated by the City of Toledo, and terminated in August 2004 when the City evicted Kim's Auto from the premises. *See Kim's Auto & Truck Serv., Inc. v. City of Toledo*, No.

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ciencies in the standing theory of the Ohio taxpayers detailed above, the Michigan taxpayers' claimed injuries—loss of "economic opportunities, in the form of jobs," and "tax revenues" for Michigan, "from which the Michigan Plaintiffs would have benefited" (J.A. 29a)—are not redressable by the injunctive and declaratory relief sought in the complaint. Whatever the result of this litigation, it cannot seriously be contested that the Stickney Avenue Jeep Plant will remain in Toledo, Ohio, and the economic opportunities of which the Michigan taxpayers claim they were deprived will remain out of reach. That is fatal to their claim of standing.

04A105 (U.S. Aug. 4, 2004) (Stevens, J.) (denying application for stay pending certiorari). The absence of causation is amply demonstrated by the fact that Kim's Auto alleges no injury as a result of the enactment of the ITC in 1995 or any subsequent application of the ITC except for that arising out of DaimlerChrysler's investments in the Stickney Avenue Jeep Plant. It is obvious enough from the face of respondents' complaint that, but for the City's eminent domain proceeding to take its property, Kim's Auto had no objection to (never mind an injury traceable to) DaimlerChrysler's use of the ITC. This demonstrates conclusively that Kim's Auto's injuries were not caused by Ohio's enactment or administration of the ITC.

Moreover, regardless of their cause, the ***economic*** injuries alleged by Kim's Auto are not redressable by the injunctive and declaratory relief sought in the complaint. The redressability requirement of Article III looks to "whether a plaintiff 'personally would benefit in a tangible way from the court's intervention.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 n.5 (1998) (quoting *Warth*, 422 U.S. at 517). Whatever the result of this litigation, Kim's Auto never stood to receive any benefit from it. The complaint did not seek to enjoin completion of the new plant, nor would an injunction against the awarding of tax credits to petitioner have achieved such an outcome. In any event, the property on which Kim's Auto once stood was seized last summer by the City of Toledo pursuant to its eminent domain power; Kim's Auto was compensated for that taking; and the Stickney Avenue Jeep Plant now stands where Kim's Auto once stood. The relief sought in the complaint, if granted, can change none of that. This Court thus should conclude that Kim's Auto also lacks Article III standing to challenge the ITC. *See Steel Co.*, 523 U.S. at 105-06 (finding standing to be lacking where "[n]one of the specific items of relief sought [in the complaint in this case], . . . would serve to reimburse respondent for losses caused by the [asserted consti-

tutional violation], or to eliminate any effects of that [violation] upon respondent").

With all respondents lacking Article III standing to challenge the ITC, this Court should vacate the decision below in relevant part and remand with instructions that respondents' federal challenges to the ITC be dismissed. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235-36 (1990).

II. THE OHIO ITC DOES NOT VIOLATE THE COMMERCE CLAUSE

Employing a concededly "novel" theory of the dormant Commerce Clause, the court of appeals invalidated Ohio's ITC, which even respondents acknowledged was nothing more than a "subsidy" for investments in the State. J.A. 28a. Purporting to apply this Court's four-part test in *Complete Auto Transit*, 430 U.S. at 279, the court of appeals concluded that Ohio's ITC fails the third prong—*i.e.*, that Ohio's ITC "discriminate[s] against interstate commerce," and therefore violates the dormant Commerce Clause. Pet. App. 4a; *see id.* 11a. Analyzing the supposed discrimination, the Sixth Circuit accepted respondents' contention that "as between two businesses, otherwise similarly situated and each subject to Ohio taxation," the one-time subsidy offered by the Ohio ITC "coerc[es] businesses . . . to expand locally rather than out-of-state." *Id.* 6a. The supposed "coerci[on]" emanates from the fact that "the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax." *Id.* The Sixth Circuit concluded that this subsidization of the Ohio tax burden on in-state investors worked "coerci[on]" on potential out-of-state investors because "the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other

states," and "economically speaking, the effect of a tax benefit or burden is the same." *Id.* 6a, 9a, 10a.

The Sixth Circuit's reasoning sweeps so broadly that it would invalidate firmly established economic development policies in nearly every state in the Union and upset the investment-backed expectations of thousands of businesses that made—and continue to make—rational economic decisions in reliance on those policies. In striking down state laws that merely offer tax incentives to attract economic development, the reasoning adopted by the Sixth Circuit would unmoor the Commerce Clause from its central purpose—prohibiting protectionist tariffs that suppress competition—and it would require this Court to abandon its oft-repeated directions that "subsidization of domestic industry does not run afoul of [the Commerce Clause]," *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988), and that nothing in that Clause "prevent[s] the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336.

The Sixth Circuit's analysis ultimately founders on its own terms. Ohio does not place a financial burden on out-of-state capital investment. Rather, because Ohio's corporate franchise tax levies only against business value in Ohio, a corporation's out-of-state investment is essentially Ohio-tax-free. The court of appeals' discrimination analysis fails as well, because although Ohio's ITC unquestionably treats in-state and out-of-state investors differently, the two are not similarly situated vis-à-vis Ohio's corporate franchise tax, which applies to the in-state portion of a business's activity and presence. Indeed, the decision below ultimately raises its own constitutional problems. The position advocated by respondents not only would undermine our federal system by limiting the flexibility of states to remedy problems peculiar to their geography and population, but also would trample upon other states' prerogatives *not* to encourage the kinds of capital investment promoted by Ohio's ITC.

A. The Commerce Clause Protects Commerce From Protectionist State Laws That Suppress Competition

The Commerce Clause empowers Congress "To regulate Commerce with foreign Nations, and among the several States." U.S. Const. Art. I, § 8, cl. 3. The Framers created this Clause principally to "avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation," *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979), and thereby to ensure that "every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them," *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) (Jackson, J.). *See also* The Federalist Nos. 42 (James Madison), 7, 11 (Alexander Hamilton); Gerald Gunther & Kathleen Sullivan, *Constitutional Law* 141 (13th ed. 1997) ("the national commerce power, it was hoped, would afford the means to end hostile state restrictions, retaliatory trade regulations, and protective tariffs on imports from other states"). The Court has long inferred from this historical purpose of preventing protectionist state legislation that, beyond authorizing congressional regulation of interstate commerce, the Commerce Clause also includes a negative or dormant aspect that, "by its own force and without national legislation, puts into the power of the Court to place limits on state authority." Felix Frankfurter, *The Commerce Clause Under Marshall, Taney & Waite* 18 (1937).

This Court has applied the dormant Commerce Clause to invalidate state regulations and taxation schemes that are deemed to "discriminate[] against or unduly burden[] interstate commerce and thereby 'imped[e] free private trade in the national marketplace.'" *Gen. Motors Corp.*, 519 U.S. at

287 (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980)). The "paradigmatic" violation "is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." *West Lynn Creamery*, 512 U.S. at 193. Although the Court has applied the Clause to many variations on that paradigm—for example, laws that tax "'a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State,'" *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (quoting *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992)), or that "discourage domestic corporations from plying their trades in interstate commerce," *id.* at 333—it long has been settled that the Clause is concerned chiefly with the use of state authority "with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935); *see, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism"); *see also Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 817 (1976) (Stevens, J., concurring) (acknowledging "common and correct interpretation of the Commerce Clause as primarily intended . . . to inhibit the several States' power to create restrictions on the free flow of goods within the national market, rather than to provide the basis for questioning a State's right to experiment with different incentives to business").

From its earliest cases, protectionist tariffs and tax regimes calibrated to the same protectionist ends have been the principal evil against which this Court's dormant Commerce Clause jurisprudence has been directed. Soon after it first recognized the Commerce Clause's negative aspect, the Court invalidated a Missouri law that required payment of a license fee to sell goods that "are not the growth, produce, or manufacture of the State" because such a fee "must add to

the price of the article, and be paid by the consumer or by the importer himself in like manner as a direct duty on the article itself." *Welton v. Missouri*, 91 U.S. 275, 278, 279 (1876). If the statute were upheld, "[i]mposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating State legislation, favorable to the interests of one State and injurious to the interests of other states and countries . . . might follow . . . from the action of some of the States." *Id.* at 281. Similarly, in 1880, the Court invalidated a Baltimore ordinance that imposed port fees for the wharfage of out-of-state goods, but not for Maryland-produced goods, holding that "the State could not . . . build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other states." *Guy v. Baltimore*, 100 U.S. 434, 443 (1880).

This commitment to free trade among the several States and the accompanying hostility toward protective tariffs (and taxes and fees that function effectively as such) animates this Court's more recent dormant Commerce Clause decisions as well, including, critically, all the cases on which the court of appeals principally relied for its holding. In *Boston Stock Exchange*, the Court upheld the challenge of six regional stock exchanges and struck down New York's two-tier transfer tax that imposed a smaller tax on securities sales completed in New York than it imposed on identical transactions completed on out-of-state exchanges. 429 U.S. at 337. After specifically emphasizing that the legislative history revealed New York changed its once-unitary stock transfer tax into a two-tier system in order to protect the primacy of the New York Stock Exchange, *see id.* at 325-28, and that the switch to the two-tier tax was "necessary to '[retain] within the state of New York . . . sales involving large blocks of stock,'" *id.* at 334, the Court held the tax unconstitutional "[b]ecause [the tax] imposes a greater tax liability on out-of-state sales than on in-state sales." *Id.* at 332. The "obvious effect" of the additional burden placed on the out-of-state sales "[wa]s to

extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges." *Id.* at 331. The state tax thus operated in derogation of "the constitutional policy of free trade and competition" that led to the drafting of the Commerce Clause. *Id.* at 336.

The Court took a similar approach in *Maryland v. Louisiana*. In that case, the Court concluded that Louisiana's "first-use" tax on natural gas entering the State from the outer continental shelf (OCS), when coupled with a package of exemptions and credits available only to in-state gas users, operated effectively as a tariff against processing or end-use of gas out-of-state, and protective of Louisiana's gas users—the refining and energy production industries. *See* 451 U.S. at 733 ("Louisiana consumers of OCS gas for the most part are not burdened by the Tax, but it does apply uniformly apply to gas moving out of the State."). The Court held that Louisiana's tax package "unquestionably discriminates against interstate commerce in favor of local interests" because "[c]ompetitive users in other States are burdened with the Tax," while "Louisiana consumers of [OCS] gas are . . . substantially protected against the impact of the First-Use Tax." *Id.* at 756, 757.

In *Westinghouse*, the Court confronted an even more "pernicious" tax-and-credit regime—one that, because the credit depended upon the *ratio* of business conducted in-state to that conducted out-of-state, "penalize[d]" increased out-of-state commerce even when the amount of in-state business remained constant. 466 U.S. at 401 & n.9. The Court invalidated an amendment to New York's franchise tax statute that, in order to capture the income of certain federal-tax-exempt export subsidiaries (known as DISCs), required such income to be consolidated with the income of the parent company, and then assessed a franchise tax against the consolidated income. *Id.* at 392-93. In an effort to encourage these export entities to remain in New York despite the state tax on DISC income, New York also provided a partially offsetting tax

credit, the size of which depended on the proportion of the subsidiary's shipping activities conducted from New York. *Id.* More specifically, the credit grew as the subsidiary "move[d] a greater percentage of its shipping activities into the State of New York," and, because the credit was based on the *percentage* of business in New York (rather than the absolute amount), the tax credit also "penalize[d] increases in the [taxpayer's] shipping activities in other States." *Id.* at 400-01.

Westinghouse challenged the tax credit as discriminating against DISC export activities conducted out-of-state. *Id.* at 395-96. The acknowledged purpose of this "penal[ty]" on out-of-state commercial activity was "to ensure that New York would not lose its competitive position vis-à-vis other States." *Id.* at 397. The Court held that this violated the Commerce Clause's fundamental prohibition on "taxing measures that impose[] greater burdens on economic activities taking place outside the State than were placed on similar activities within the State," even when the purpose of such taxing measures is to "encourage[] the development of local industry." *Id.* at 404.

Finally, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Court found unconstitutional a Hawaii statute that levied a 20 percent tax on all liquors sold in the State, but then exempted two locally-produced liquors. *Id.* at 273. Though it was framed as a measure to "encourage and promote the establishment of a new [Hawaiian liquor] industry," the tax nevertheless amounted to "simple economic protectionism." *Id.* at 270 (internal quotation marks omitted). The liquor tax-and-exemption scheme violated the Constitution because the end of local economic development was achieved by raising the cost of all liquors—in-state and out-of-state—and then exempting certain in-state products from that increase, in the hope that "drinkers of other alcoholic beverages might give up or consume less of their customary

drinks in favor of the exempted products because of the price differential that the exemption will permit." *Id.* at 269.

Beyond the fact that the tax scheme in every one of these cases had a manifestly protectionist *purpose*, each also functioned as a protectionist tariff in its operational *effect*, increasing the cost of doing business out-of-state or with out-of-state actors, and doing so in a discriminatory manner, *i.e.*, to a greater extent than it raised the cost of doing business in-state or with in-state actors. Indeed, it is in precisely these terms that this Court has defined "economic protectionism—that is, 'regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647 (1994) (quoting *New Energy*, 486 U.S. at 273-74). This protectionist effect remains the central concern of this Court's dormant Commerce Clause jurisprudence.

The dormant Commerce Clause historically has not been implicated, however, by state actions that seek simply to encourage local economic development by reducing economic and non-economic costs of doing business in a particular state or locality. Thus this Court has never found occasion to question the constitutionality of direct subsidies to local business activity, *see, e.g.*, *New Energy*, 486 U.S. at 278, and such programs had been—until the decision below—universally upheld against Commerce Clause challenges in the courts of appeals. *See, e.g.*, *Fireside Nissan, Inc. v. Fanning*, 30 F.3d 206, 217 (1st Cir. 1994) (finding "alleged beneficial effect of [state law] is too far afield from the protectionism that the Commerce Clause prohibits"); *see also W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 494-95 (7th Cir. 1984) (discussing "freedom that states have under the Constitution to provide, often selectively, for the welfare of their residents" including "a thousand devices" to "subsidize the state's [local industry]"). Nor has it employed the Commerce Clause to "prevent the States from structuring their tax systems to encourage the growth and development of intra-

state commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336; *see also Caterpillar, Inc. v. Dep't of Treasury*, 488 N.W.2d 182, 193 (Mich. 1992) (upholding Michigan's "capital asset deduction," holding that "discriminatory effect does not result from fair encouragement of in-state business"). Rather, these types of business incentives are among the myriad "laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry," that "a State may enact." *Bacchus Imps.*, 468 U.S. at 271.

B. Ohio's ITC Neither Burdens Interstate Commerce Nor Discriminates Against Out-Of-State Actors

Ohio's ITC—conceded by respondents to be merely a "subsidy," J.A. 28a—suffers from none of the flaws that doomed other taxation schemes challenged in this Court's dormant Commerce Clause cases. Before a state taxation regime may trigger dormant Commerce Clause scrutiny, it must, at an irreducible minimum, fix a burden on interstate commerce, which is to say, on transactions occurring out-of-state or with out-of-state actors. Unlike those cases in which this Court has invalidated state taxes, though, Ohio's corporate franchise tax does not place a burden on the out-of-state conduct that is the subject of respondents' discrimination claims, *i.e.*, acts of capital investment made outside Ohio. Indeed, far from increasing a corporation's Ohio franchise tax burden, out-of-state investments generally have the effect of reducing a corporation's Ohio franchise tax rate. Thus, Ohio's ITC functions exclusively as a subsidy to those businesses that choose to increase in-state capital investment. It therefore should be upheld as a proper exercise of Ohio's power to secure the health and welfare of its citizens.

Even if Ohio's franchise tax, when coupled with the ITC, could be viewed as a regulatory measure that burdens interstate commerce, it easily survives dormant Commerce Clause

scrutiny. Contrary to the Sixth Circuit's conclusion, Ohio's ITC does not unlawfully discriminate against interstate commerce. A finding of discrimination necessarily implies a comparison of two similarly situated entities. Although Ohio's ITC concededly differentiates between in-state and out-of-state investments, corporations that invest in Ohio and corporations that invest outside of Ohio are not similarly situated in relation to Ohio's corporate franchise tax (against which the ITC acts as a credit). Corporations that invest capital in Ohio do so at the expense of increasing their effective franchise tax rate; corporations that invest elsewhere generally ***reduce*** their Ohio franchise tax burden. There is nothing pernicious or discriminatory about awarding an offsetting credit to (*i.e.*, subsidizing) only those parties that have elected to increase their franchise tax liability to the State.

1. Ohio's Franchise Tax And ITC Do Not Place Any Burden On Out-Of-State Capital Investment

As this Court has recognized, "[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.*" *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 591 (1997) (quoting *New Energy*, 486 U.S. at 278) (emphasis in original). Accordingly, this Court has held that nothing in the dormant Commerce Clause "prevent[s] the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336; *see also Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 385 (1991) (it is "a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State"); *see also Hughes*, 426 U.S. at 816 (Stevens, J., concurring) ("Nor, in my judgment, does [the Commerce] Clause inhibit a State's power to experiment with different methods of encouraging

local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce."). Therefore, when a generally applicable, one-time credit against taxation on in-state activity operates as a subsidy to local business activity—"impos[ing] no burden on interstate commerce, but merely assist[ing] local business"—it cannot be said to transgress the dormant Commerce Clause's limitations on state authority. *West Lynn Creamery*, 512 U.S. at 199. Rather, such tax benefits are classic exercises of the States' police power. *See Bacchus Imps.*, 468 U.S. at 271.[9]

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[9] The Sixth Circuit apparently assumed that Ohio's decision to subsidize in-state economic development through a tax credit, as opposed to a direct appropriation, itself made the state action an exercise of *regulatory* power over interstate commerce. *See* Pet. App. 10a ("Thus, the distinction between a subsidy and a tax credit, in the constitutional sense, results from the fact that the tax credit involves state regulation of interstate commerce through its power to tax."). This is manifestly incorrect. First, it flatly contradicts respondents' own acknowledgement in their complaint that the ITC is, in fact, a "subsidy." J.A. 28a. Moreover, it is not the exercise of the power to tax that makes a state action regulatory in nature. A state *regulates* interstate commerce only when it places regulatory or financial *burdens* on interstate commerce. *See New Energy*, 486 U.S. at 273-74 (Commerce Clause prohibits state "*regulatory* measures designed to benefit in-state economic interests by *burdening* out-of-state competitors") (emphasis added). Thus, the "constitutionally significant difference between subsidies and tax exemptions" that the Court found in *Camps Newfound*, 520 U.S. at 590, necessarily dissipates either when a subsidy program places financial burdens on out-of-state actors (*i.e.*, when it regulates interstate commerce), *see West Lynn Creamery*, 512 U.S. at 202-04, or, as in this case, when the tax program places no such burden on out-of-state actors, and therefore cannot be said to regulate interstate commerce.

A state tax thus triggers dormant Commerce Clause scrutiny only when it imposes a burden on interstate commerce by imposing a cost on the conduct of business out-of-state or with out-of-state actors. Once it is established that the state tax actually burdens interstate commerce, a court then may invalidate the tax (either the tax alone, or in combination with a credit or exemption) if it determines that the tax burdens interstate commerce in a discriminatory manner. *See Granholm*, 125 S. Ct. at 1895 ("state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994)); *Fulton Corp.*, 516 U.S. at 330 ("In its negative aspect, the Commerce Clause 'prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" (quoting *Lohman*, 511 U.S. at 647)). That the underlying state tax burdens interstate commerce is therefore a prerequisite for discrimination analysis under the dormant Commerce Clause.

Respondents' central contention is that, because Ohio awards the ITC only for the placement of machinery and equipment within Ohio, its franchise tax unconstitutionally burdens decisions to invest out-of-state. *See* Opp. 10-11; *see also* Pet. App. 6a (deeming invalid "tax schemes that . . . impos[e] greater burdens on economic activity taking place outside the state"). This contention lacks merit. As this Court has recognized, a franchise tax is simply a "tax on the income of a business from its aggregated business transactions." *Westinghouse Elec. Corp.*, 466 U.S. at 404. The relevant transaction here—the transaction respondents claim is unlawfully affected by Ohio's tax-and-credit scheme—is a corporation's investment of capital out-of-state. Ohio's franchise tax, however, does not levy upon that out-of-state transaction. Although the ITC certainly reduces the cost of capital investments within Ohio—indeed, that is precisely its

point—Ohio's franchise tax itself does not increase the cost of out-of-state investments. Far from increasing the cost of investing out-of-state, a corporation's decision to invest outside of Ohio will reduce its effective Ohio tax rate, and thus, typically, the amount due.

Ohio's franchise tax is levied against only that portion of "the corporation's net income," during the year in question, that is "allocated or apportioned to" Ohio (or, in some cases, the "net book value of the corporation's assets," also as apportioned to the State).[10] O.R.C. § 5733.05(B) & (C)(1). The apportionment of a corporation's business income is determined pursuant to a formula whereby a corporation's personal property value, payroll, and sales in Ohio are compared against the corporation's worldwide personal property value, payroll, and sales. *See id.* § 5733.05(B)(2)(a)-(c). The calculation therefore yields three in-state to out-of-state ratios, the weighted average of which constitutes the Ohio apportionment value.[11] The corporation's net business income (or net book value) is multiplied by the apportionment value to determine the amount apportioned to Ohio for taxation purposes. In short, the franchise tax is based on the corpora-

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[10] Within the meaning of Ohio's franchise tax statute, "allocation" refers to the "attribution to a particular jurisdiction of income from a given source, usually because the asset that is the source of that income is located in that jurisdiction," while "[a]pportionment" involves "divid[ing] income from interstate activity that is not allocated to a definite situs." *Wesnovtek Corp. v. Wilkins*, 825 N.E.2d 1099, 1100 (Ohio 2005). Under Ohio's franchise tax statute, "business income" is apportioned while "nonbusiness income"—income from rental or sale of assets—is allocated. *See* O.R.C. §§ 5733.05(B), 5733.051.

[11] In determining the apportionment value, the sales factor is weighted three times as much as the property and payroll factors. *See* O.R.C. § 5733.05(B)(2).

tion's Ohio-related business activity.[12] Because capital investment outside the State will reduce the in-state property and payroll factors used in calculating the Ohio apportionment value, the percentage of a business's net income (or net book value) allocated to Ohio will be reduced by any out-of-state investments. Thus, for the corporation that decides to build its plant out-of-state, the percentage of its income allocated to Ohio for tax purposes will decline. Ohio's franchise tax therefore does not impose a cost on the choice to locate new investment elsewhere; in fact, that business's effective franchise tax rate is reduced from its level prior to the out-of-state investment. Nor does Ohio disadvantage a business on account of an increase in the ratio of out-of-state to in-state activity or presence. The credit depends not on the percentage of investment in Ohio, but on the absolute dollar amount. Thus, a business need not worry that new investment outside Ohio will have any effect other than the lost opportunity to take advantage of the subsidy Ohio offers in the form of a tax credit for in-state investment.

Despite the fact that the franchise tax itself does not apply to out-of-state capital investments, the Sixth Circuit nevertheless concluded that Ohio's failure to confer the ITC's subsidy on corporations investing capital out-of-state itself constitutes a burden on out-of-state investment. Quoting this Court's decision in *Bacchus Imports*, the court of appeals stated that every "statute that allocates benefits or burdens unequally . . . can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense." Pet. App. 10a (quoting 468 U.S. at 273). The court thus concluded that "economically speaking the effect of a tax burden

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[12] Ohio assesses against the corporation the greater of the sum of 5.1 percent of the first $50,000 of Ohio-allocated income and 8.5 percent of the remaining Ohio-allocated net income in excess of $50,000, or 0.04 percent of the Ohio-allocated net book value. *See id.* § 5733.06(A)-(C).

or benefit is the same." Pet. App. 10a. Respondents also adopt this position that every benefit rewarding in-state activity imposes a corresponding reflexive burden on interstate commerce. *See* Opp. 11.

Only by obliterating this distinction between benefits for in-state investment and burdens on interstate conduct could the ITC be invalidated. This Court, however, has never construed the notion of a "burden" on interstate commerce so broadly. Indeed, if respondents were correct every manner of "benefit" that local governments extend to the business community in order to encourage investment would have to be struck down on the ground that it creates a corresponding "burden" on investment elsewhere. At risk, under respondents' view, would be not just cash subsidies, but also infrastructure improvements, and even perhaps vocational training programs that result in a more highly skilled workforce—***none*** of which has ever been determined by ***any*** court to implicate, let alone violate, the dormant Commerce Clause.

Instead of extending the dormant Commerce Clause so broadly, this Court has invalidated state tax-and-exemption or tax-and-credit schemes only where the underlying state tax reached—and as a result burdened—interstate transactions against which the state's tax exemption or credit supposedly discriminated. In *Bacchus Imports*, sales of liquor manufactured out-of-state were subject to a 20 percent excise tax, from which locally-produced liquors were completely exempted. *See* 468 U.S. at 265. In *Maryland v. Louisiana*, all gas transported from the outer continental shelf through Louisiana on its way out-of-state was subject to Louisiana's "first-use" tax, but Louisiana users of OCS gas were exempted or received offsetting credits. *See* 451 U.S. at 733 ("Louisiana consumers of OCS gas for the most part are not burdened by the tax, but it uniformly applies to gas moving out of the State."). In *Boston Stock Exchange*, New York's transfer tax applied to all sales of securities having a nexus to New York, including those where the sale occurred on an

out-of-state exchange, but sales completed on the New York exchange were subject to a substantially lower rate of taxation. *See* 429 U.S. at 329. Similarly, in *West Lynn Creamery* the "premium payment" to the Massachusetts Dairy Equalization Board applied to all Massachusetts milk "dealers," including those that produced milk out-of-state, while those premium payments were rebated solely to Massachusetts "milk producers." 512 U.S. at 190-91. And in *Camps Newfound/Owatonna*, Maine's property tax applied to all property owners, including not-for-profit entities that served a principally out-of-state clientele. *See* 520 U.S. at 568-69.

Finally, in *Westinghouse Electric*, which addressed a challenge to a franchise tax and credit, the state tax applied to interstate conduct. *See* 466 U.S. at 393. As the New York franchise tax statute required consolidation of the income of the export subsidiary with that of the parent entity, the tax was levied (to the extent permitted by New York's business income allocation formula) against out-of-state income-producing DISC transactions that Westinghouse claimed were discriminatorily burdened by the New York credit.[13] In

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[13] Changing the assumptions used in the Court's hypothetical examples, *see Westinghouse Elec.*, 466 U.S. at 400-02 n.9, illustrates this point. The Court's examples assume that the ratio between the parent company's income and the DISC entity's income (20:1 in Table B) will be the same as the ratio of the parent's property to the DISC's property, and the parent's payroll to the DISC's payroll. Taking Table B, and the hypothetical in which 40 percent of the parent's income of $10,000 is allocated to New York and 50 percent of DISC income of $500 is generated in New York: if instead of 20:1, the parent-to-DISC property and payroll ratios were 2:1, the New York income allocation percentage would increase from 40.48 percent to 42.38 percent. Under these circumstances, $4,450 of the consolidated income of $10,500—including $450 of the DISC income of $500—would be taxed by New York. Under that scenario, the New York franchise tax significantly increased the cost of, and thereby burdened, out-of-state DISC transactions.

fact, New York's effort to defend its statute on the ground that it ensured the credit would apply only to DISC income "taxable by the State of New York" foundered on the peculiar mechanics of that credit, which made an "inaccurate and duplicative" second adjustment based on the in-state to out-of-state ratio, thereby imposing a greater burden on exports that originated in states other than New York. 466 U.S. at 399.

The fact of the matter is that the Ohio ITC—unlike any of the provisions this Court has struck down—is a one-time financial incentive for businesses to make a new capital investment. Like a new road or improved infrastructure at or near a construction site, it reduces the cost of that investment to the business and permits Ohio to compete vigorously with other states and with foreign countries for new plants and equipment. To invalidate the ITC would be to rule that such benefits are really unconstitutional burdens on corporations given the choice whether to take advantage of them.

This Court's precedents, as just summarized, go nowhere near that extreme. Not surprisingly, respondents point to no case—in 130 years of dormant Commerce Clause jurisprudence—in which this Court invalidated a state taxation regime where the tax did not, at a minimum, levy against interstate transactions alleged to be prejudiced. In all of those cases, the states levied taxes upon interstate transactions or on transactions with out-of-state actors, with the direct effect of increasing the cost of doing business interstate. Not so here. Respondents thus ask this Court to hold for the first time that conferral of a tax benefit—as respondents concede, a subsidy—on domestic industry *itself* fixes a burden on interstate commerce.

The Sixth Circuit's ruling that a benefit conferred on local business activity imposes a corresponding burden on interstate commerce would work a sea change in this Court's dormant Commerce Clause jurisprudence. It would surely

condemn any effort by states to "structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336. Indeed, it threatens to eliminate a state's "police powers" to advance the health and welfare of its citizens by "enact[ing] laws . . . that have the purpose and effect of encouraging domestic industry." *Bacchus Imps.*, 468 U.S. at 271. If respondents are correct, there is no principled basis upon which even a direct appropriation to local business activity—financing the construction of a baseball stadium, perhaps—could pass constitutional muster.

2. *Ohio's ITC Is Granted On A Non-Discriminatory Basis*

Within the subset of state taxation regimes that actually impose burdens on interstate commerce, taxes will be sustained against a dormant Commerce Clause challenge if (1) the activity taxed has a substantial nexus with the taxing state; (2) the tax is fairly apportioned to reflect the degree of activity that occurs within the state; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to benefits provided by the state. *See Complete Auto Transit, Inc.*, 430 U.S. at 277-78. The court of appeals determined that Ohio's ITC violates the third prong of this test, *i.e.*, that it discriminates against interstate commerce.[14] *See* Pet. App. 4a-11a. It observed that "as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax." Pet. App. 6a.

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[14] Respondents had conceded that Ohio's ITC satisfied all other requirements set out in *Complete Auto Transit*. Pet. App. 4a.

The Sixth Circuit's discrimination analysis is deeply flawed. The hallmark of discrimination is treating similarly situated persons or things differently. *See Gen. Motors Corp.*, 519 U.S. at 298 ("Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities."); *see also, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (condemning under the Fourteenth Amendment "illegal discriminations between persons in similar circumstances"). A state thus discriminates against interstate commerce when, for example, (1) residents and non-residents who engage in substantially similar transactions are taxed at different rates, *see, e.g., Boston Stock Exch.*, 429 U.S. at 330-32, or (2) similarly situated businesses engage in similar transactions, and the state taxes the interstate transactions at a higher effective rate than it does the intrastate transactions, *see, e.g., Maryland v. Louisiana*, 451 U.S. at 757-58. "[W]hether the companies are indeed similarly situated for constitutional purposes," however, remains the "threshold question" to the discrimination analysis. *Gen. Motors Corp.*, 519 U.S. at 299.

Even if identical in all other respects, a corporation that invests in Ohio and a corporation that invests outside of Ohio are not similarly situated. More specifically, the ITC operates only as a credit against Ohio's corporate franchise tax, and in-state investors and out-of-state investors are not similarly situated vis-à-vis that franchise tax. This is amply demonstrated by the hypothetical scenario of two identical start-up ventures, one that locates its machinery and equipment in Ohio and one that locates its operations in another state. In this scenario, the startup venture that locates in Ohio will be subject to Ohio's franchise tax; the business that locates in another state will not.

It is this obvious deficiency in respondents' legal theory that presumably led to the court of appeals' odd limitation of its holding to businesses already "subject to Ohio taxation." Pet. App. 6a. Even among the subset of businesses already

subject to Ohio's franchise tax, however, in-state and out-of-state investors are not similarly situated because businesses choosing to expand their Ohio presence will also incur an increased Ohio franchise tax basis due to that expanded presence. The new property itself, as well as the likely increase in payroll for jobs added as a result of the new capital investment, enlarges the percentage of business income apportioned to Ohio to which the franchise tax rate is applied. Conversely, a business that invests outside of Ohio will reduce its apportionment of income to Ohio and consequently will be taxed at a lower effective rate. In-state and out-of-state investors thus are not similarly situated vis-à-vis Ohio's franchise tax.

Even if in-state and out-of-state investors could be construed as similarly situated, the court of appeals erred in concluding that in-state and out-of-state investors are differently treated. This error flowed from the court of appeals' failure to take into account the full economic effect of a business's decision regarding where to locate additional machinery and equipment. When the *full* array of in-state and out-of-state investment options are considered, the result is that Ohio's credit does not impose a discriminatory burden on interstate commerce. Any business choosing to expand its presence in a location *other than* Ohio will be subject to that locale's tax on business activity (if any) and may also be eligible for a tax credit under local law. Whether the out-of-state investor's overall tax burden is greater or smaller than that of the in-state investor is entirely dependent on whether other states choose to compete with Ohio by offering their own incentives, through lower tax rates, tax credits or some other financial inducement.[15] So while Ohio itself may treat in-state

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[15] Ohio's decision to attract capital investment with a one-time tax credit does not impede the ability of other states to compete for such investment with incentive packages most suitable to those states. For example, another state could offer the same type

and out-of-state investors differently, the out-of-state investor can avoid any potential effect of that different treatment by taking advantage of comparable investment incentives offered elsewhere. Thus, Ohio's tax credit does not necessarily favor in-state investors over out-of-state investors, even though the two are not similarly situated. As respondents challenge Ohio's ITC statute on its face, it is their burden to demonstrate that the ITC is always discriminatory. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

This ability of businesses to compare the Ohio ITC to inducements offered by other states is an essential part of the discrimination calculus that the Sixth Circuit's analysis utterly ignores. As this Court has recognized in applying the dormant Commerce Clause, it is entirely appropriate to consider how a provision such as the ITC operates in the context of other states' laws. *Cf. Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995) (applying "internal consistency" test and inquiring whether "imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear"); *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (noting that "the practical effect of the statute must be evaluated . . . by considering . . . what effect would arise if not one, but many or every, State adopted

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of tax credit, a permanently lower franchise tax rate (including no tax at all), or any mix of subsidies, infrastructure improvements, general economic conditions or "quality of life" inducements. The business deciding where to locate new capital investment will take all of the economic effects of each option into consideration, ensuring that the benefits of competition between the several States are fully realized.

similar legislation"); *Scheiner*, 483 U.S. at 282-83 (noting that registration fee "has its counterpart in every other State" and that "the Commerce Clause is not offended when state boundaries are economically irrelevant"). Here, because nearly every state has tax incentives comparable to Ohio's, the result is lower tax burdens for all investments and the free flow of commerce across state lines in a highly competitive marketplace—hardly the barrier to interstate commerce or Balkanization traditionally thought to be the concern of the Commerce Clause. Even if no other state offered incentives to investment similar to the ITC the principal effect of the ITC would be to encourage businesses to invest for the first time in Ohio—that is, to engage in interstate, rather than intrastate commerce.[16]

The fact that states have the ability to compete with one another by offering their own tax credits and other inducements means that no business is "coerce[d]" to place its machinery or equipment in Ohio. Nor are businesses that face the type of investment decision made by DaimlerChrysler "pinch[ed]" or "squeeze[d]" by Ohio's system of credits. *Camps Newfound*, 520 U.S. at 573-74 ("Even when business activities are purely local, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." (citations and internal quotation marks omitted)). Rather, a business that chooses Ohio for economic reasons does so because Ohio's financial incentives are better than those of competing locales. Therefore, to determine if Ohio's ITC improperly discriminates, it makes no sense to compare the business that invests in Ohio with a business that locates elsewhere. The latter will subject

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[16] The ITC is especially attractive to out-of-state companies that have never made a capital investment in Ohio, because they will always meet its requirement of increasing investment over prior years' levels.

its increased business activity to a different state's taxation and credit formula.

Finally, in concluding that Ohio's ITC is awarded on a discriminatory basis, the Sixth Circuit failed to compare all businesses that can qualify for the credit. Ohio treats equally any company willing to pump additional investment into Ohio, regardless of where the company is domiciled, regardless of whether it has invested in Ohio in the past, and regardless of its other activity outside the State of Ohio. If the company chooses not to locate its investment in Ohio, it merely loses the opportunity to earn a subsidy for doing business in that State. It is this feature that distinguishes the Ohio tax credit from the provisions struck down in *Boston Stock Exchange*, *Maryland v. Louisiana*, and *Westinghouse*. As noted earlier, in each of those cases, the state impermissibly used its taxing scheme to give an advantage to business activity conducted locally by imposing a discriminatory tax burden on those taxpayers who engaged in a greater proportion of activity out-of-state.

C. The Sixth Circuit's Ruling Unduly Interferes With The Federal System In Which States May Exercise Different Prerogatives And Policy Choices

The Sixth Circuit's novel and expansive interpretation of the dormant Commerce Clause comes at a high price. Principles of federalism, not to mention those underlying the Commerce Clause itself, demand that states be given great flexibility in devising the most effective methods to compete with one another for capital investment. Adopting the lower court's interpretation, as advocated by respondents, would discourage innovation and do violence to "the values of federalism which have long animated [this Court's] constitutional jurisprudence." *West Lynn Creamery*, 512 U.S. at 217 (Rehnquist, C.J., dissenting). Such a ruling would also *con-*

flict with this Court's Commerce Clause rulings by creating a framework where states may use tax breaks to stimulate investment only if they are willing to encroach on the prerogatives and policy choices of other states.

The dormant Commerce Clause doctrine "reflect[s] basic principles of federalism." Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 260 (2002). In pronouncing the Commerce Clause's proper effect and reach, courts must maintain a sensitivity for the federalist principles that inform it. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 703 (1999) (Breyer, J., dissenting) ("Federalism matters to ordinary citizens seeking to maintain a degree of control, a sense of community, in an increasingly interrelated and complex world. Courts can remain sensitive to these needs when they interpret statutes and apply constitutional provisions, for example, the dormant Commerce Clause."). Thus, this Court has "long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration." *Nat'l Private Truck Council v. Okla. Tax Comm'n*, 515 U.S. 582, 586 (1995); *see also Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 297 (1998) ("Because state legislatures must draw some distinctions in light of 'local needs,' they have considerable discretion in formulating tax policy.").

The court of appeals' construction of the dormant Commerce Clause undercuts one of the greatest benefits of our federal system—the ability of states to experiment with varying approaches as they devise a mix of tools, tailored to unique local circumstances, for attracting new investment and improving the local economic climate. The ability of each state to devise its own tax structure and corresponding incentives to stimulate development is an example of what Justice Brandeis identified as a "one of the happy incidents of the federal system." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). That is, a

state may "experiment[] in things . . . economic" through novel regulation, like the ITC. *Id.* And the benefits derived may extend beyond the borders of the individual state: "Flexibility for experimentation not only permits each state to find the best solutions to its own problems, it is the means by which each state may profit from the experiences and activities of all the rest." *EEOC v. Wyoming*, 460 U.S. 226, 265 (1983) (Burger, C.J., dissenting); *see also Gonzales v. Raich*, 125 S. Ct. 2195, 2220 (2005) (O'Connor, J., dissenting) ("One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'").

It should come as no surprise that differences between the States in areas such as infrastructure development, tax base, natural resources, wage structure, and labor pool skills—just to name a few—translate into different approaches to attracting investment. For instance, states with a well-developed infrastructure and skilled workforce, but higher operating costs, may place a greater emphasis on tax credits than states with poorly developed infrastructure and relatively unskilled labor. *See* Br. of the Int'l Workers of Am., UAW as *Amicus Curiae* in Supp. of Pet. for a Writ of Cert., *DaimlerChrysler Corp. v. Cuno*, No. 04-1704 (U.S. July 15, 2005). That states have found it necessary to rely on different tools to different degrees as they compete for business development is hardly a novel phenomenon. *See Avery v. Midland County*, 390 U.S. 474, 485 (1968) ("The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems."). Yet, the Sixth Circuit's ruling threatens this fundamental federalist principle.

Although the Sixth Circuit found it troubling that Ohio does not confer a benefit on any party that increases its capital investment outside of Ohio's territorial jurisdiction, *see*

Pet. App. 6a, Ohio's particular concern for investment in its own industries is a *positive* feature of the federal system. "Viewed as a whole, [this Court's] jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances." *Kelo v. City of New London*, 125 S. Ct. 2655, 2664 (2005). The interests of Ohio in spurring investment in manufacturing might not be shared—and most likely would not be shared to the same degree—by each of the other 49 States. These variations in policies and priorities are appropriately given force through the varying tax codes of the 50 States.

Taking up the Sixth Circuit's implicit suggestion that Ohio could cure the ITC's alleged constitutional deficiency by rewarding and, thereby spurring, industrial investment in other states, it is readily apparent that such a scheme would run counter to these federalist principles as well as the dormant Commerce Clause's underlying purpose. The Sixth Circuit's approach greatly increases the risk that one state will interfere with the priorities and policies of other states. Indeed, if Ohio must equally reward investment regardless of where that investment occurs, such encouragement would come at the expense of the prerogatives of its sister states. Such a tax credit, granted to Ohio corporations for investment in other states, would *directly* lower the price of new plant construction in those states. This trespasses on other states' sovereignty and might even run counter to their various policy objectives. For instance, some states might harbor particular socio-economic or environmental concerns that make new plant construction undesirable.

This Court has declared that "no single State . . . [can] impose its own policy choice on neighboring States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996); *see also Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particu-

lar."). This Court underscored this principle in enforcing the Commerce Clause in *Healy v. The Beer Institute*, 491 U.S. 324 (1989): "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* at 336; *see also Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582-83 (1986) ("While New York may regulate the sale of liquor within its borders, and may seek low prices for its residents, it may not 'project its legislation into [other States] by regulating the price to be paid' for liquor in those States." (quoting *Baldwin*, 294 U.S. at 521)).

The dormant Commerce Clause limits a state's powers of economic regulation to activities occurring within its own borders. This ensures not only that each state remains the master of its economic affairs, but also affords it the flexibility to tailor economic development policies to local needs. The Sixth Circuit's contrary ruling injures the federal system and the values of federalism that animate dormant Commerce Clause jurisprudence.

CONCLUSION

The judgment of the court of appeals should be vacated in relevant part and the case should be remanded with instructions that the respondents' federal challenges to Ohio's ITC be dismissed. Should the court reach the merits, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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